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A Military Readiness Exception to NEPA: It's Not Just For The Birds

By

Gretchen D. Sosbee

B.A., June 1997, University of California, San Diego

J.D., May 2002, Santa Clara University School of Law

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Thesis directed by

Dean Lee Paddock

Associate Dean for Environmental Studies and Professorial Lecturer in Law

Disclaimer

LCDR Gretchen Sosbee serves in the United State's Navy Judge Advocate General's Corps. This paper was submitted in partial satisfaction of the requirements for the degree of Master of Laws in Environmental Law at The George Washington University Law School. The views expressed in this paper are solely those of the author and do not reflect the official policy or position of the United States Navy, Department of Defense or U.S. Government.

Abstract

To facilitate effective and efficient military training, the National Environmental Policy Act of 1969 (NEPA) should be amended to provide for an exemption for military readiness activities.

Although NEPA was enacted for the laudable purpose of improving environmental review and planning, the Environmental Impact Statements (EIS) produced under NEPA have often become unwieldy and over-burdensome, especially for activities involving military training. It is time to reconsider whether a process that was never intended to generate thousands of pages of paperwork has become unworkable in the context of military preparedness and training.

This paper considers the case of *Winter v. NRDC*, and analyzes five options to increase efficiency in environmental planning for military readiness activities. This paper examines: revised categorical exclusions, use of environmental assessments with mitigation, the development of a general EIS for training ranges, a statutory amendment and the use of alternative arrangements. Although the concept of functional equivalence supports the argument for a complete statutory amendment to NEPA, this paper concludes that the most efficient solution is an approach that amends the regulations defining alternative arrangements to include provisions for military readiness activities. Using alternative arrangements ensures a balance between efficient use of resources and environmental stewardship that is necessary for continued flexibility in military training.

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Introduction

The Department of Defense is not immune from the ongoing complaints about and scrutiny of government spending.[1] Congress and the President have directed federal agencies to reduce operating costs.[2] During any period of economic belt-tightening, it is reasonable to reevaluate efficiency on every level. This review must include the efficiency of environmental review processes.

The current framework of environmental planning under the National Environmental Planning Act of 1969[3] (NEPA) is inefficient and unworkable for military readiness activities. The planning process is redundant with other statutory requirements and is too lengthy and too time consuming to provide for sufficient flexibility for military training.

Military training activities[4] frequently have impacts on the environment. Weapons are by their nature destructive and use of live ammunition during

[1] Gillian Brockwell, *DoD experts weigh in on the way out of budget squeeze*, FEDERALNEWSRADIO.COM, Apr. 6, 2012, http://www.federalnewsradio.com/?nid=412&sid=2817768.
[2] Interview with CDR Christopher Corvo, Office of Assistant Secretary of the Navy (Energy, Installations and the Environment) (Apr. 6, 2012).
[3] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 – 4347 (2011); 40 C.F.R. §§ 1500-1508 (2012).
[4] For purposes of this paper, the terms military training activities and military readiness activities are used interchangeably. Military readiness is defined as ""(1) (A) all training and operations of the Armed Forces that relate to combat; and (B) the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use. (2) The term does not include – (A) the routine operation of installation operating support functions, such as administrative offices, military exchanges, commissaries, water treatment facilities, storage facilities, schools, housing, motor pools, laundries, morale, welfare and recreation activities, shops and mess halls; (B) the operation of industrial activities; or (C) the construction or demolition of facilities used for a purpose described in subparagraph (A) or (B)." 16 U.S.C. §703 (2011).

operational exercises may kill or injure species in the immediate area. This creates a conflict between the military's statutory obligations to be ready for combat operations and the statutory obligations it may have under environmental laws. But, the military must train as it fights. Personnel will not be prepared to meet operational requirements if realistic training scenarios are not carried out. Although not every exercise requires extensive simulations to be effective, the military needs flexibility to determine the need for and type of exercises required for readiness. Planning for these exercises should be conducted in an efficient manner in order to maintain flexibility.

Environmental planning for military exercises is expensive, manpower intensive and not sustainable for future military readiness activities.[5] Environmental analysis may take years to create and typically generates in excess of thousands of pages of paperwork.[6]

The military is often criticized for attempting to exempt itself from environmental statutes.[7] Often the challenge to NEPA-related disputes is "if

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[5] Interview, *supra* note 2.

[6] *See generally*, U.S. NAVY AT-SEA ENVIRONMENTAL COMPLIANCE, https://portal.navfac.navy.mil/portal/page/portal/navfac/navfac_ww_pp/navfac_hq_pp/navfac_environmental/documents/atlantic%20documents,pacific%20documents (last visited Apr. 23, 2012).

[7] *See generally, Environmental Laws: Encroachment on Military Training?: Hearing Before the S. Comm. on Environment and Public Works,* 108th Cong. 108-308 (2003) (debating military exemptions from environmental laws of training); *Current Environmental Issues Affecting the Readiness of the Department of Defense: J. Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection and the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce,* 108th Cong. 108-119 (2004) (debating a military exemption from RCRA, the CAA and CERCLA); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-407, MILITARY TRAINING: COMPLIANCE WITH ENVIRONMENTAL LAWS AFFECTS SOME TRAINING ACTIVITIES, BUT DOD HAS NOT MADE A SOUND BUSINESS CASE FOR ADDITIONAL ENVIRONMENTAL EXEMPTIONS (2008) (concluding exemptions from the CAA, RCRA and CERCLA for military training is unnecessary).

Congress intended a national security exemption to NEPA, it would have included it in the statute as it did with other environmental statutes."[8] But, NEPA was enacted before those "other" environmental statutes.[9] An exemption should be created for military readiness because of the existing inefficiencies in the planning process. NEPA requires that federal agencies evaluate the environmental impact "to the fullest extent possible."[10] This evaluation, however, should be conducted "consistent with other essential considerations of national policy."[11] NEPA "acknowledges that other goals and interests of the United States may make strict compliance with NEPA impossible."[12] In order to promote efficiency, while balancing environmental concerns, NEPA should be amended to provide for an exemption for military readiness activities.

There are several options to promote efficiency and flexibility in environmental planning for military readiness activities. This paper evaluates the effectiveness of five options: categorical exclusions, mitigated findings of no significant impacts, general environmental impact statements, statutory amendment and alternative arrangements. In order to promote efficient environmental planning, this paper advocates for a combined approach of using a statutory amendment and alternative arrangements. Using the prior statutory amendment to the Migratory Bird

[8] Emily Donovan, Article, *Deferring to the Assertion of National Security: The Creation of an National Security Exemption Under the National Environmental Policy Act of 1969*, 17 HASTINGS W.-N.W. J. ENV. L. & POL'Y 3, 26-27 (2011).
[9] For example, the Clean Air Act was enacted in 1970, the Federal Water Pollution Control Act was enacted in 1972, the Solid Waste Disposal Act was enacted in 1972, the Resource Conservation and Recovery Act was enacted in 1976, the Comprehensive Environmental Response, Compensation, and Liability Act was enacted in 1980, the Coastal Zone Management Act was enacted in 1972 and the Endangered Species Act was enacted in 1973.
[10] 42 U.S.C. § 4332 (2012).
[11] 42 U.S.C. § 4331 (2012).
[12] Valley Citizens for a Safe Env't v. Vest, 1991 U.S. Dist. LEXIS 21863, 3, 12 (1991).

Treaty Act as a model, the Council on Environmental Quality should be directed to amend its regulations to include military readiness activities in the category of actions that may be considered for alternative arrangements. This solution maintains agency oversight, preserves public involvement and promotes flexibility and efficiency while balancing environmental stewardship obligations.

Part I of this paper outlines the statutory requirements for military training. Part II of this paper reviews the statutory and regulatory requirements of NEPA. Part III reviews the NEPA compliance process of the United States Navy by analyzing *Winter v. Natural Resources Defense Council*,[13] a United States Supreme Court case addressing naval training and the use of alternative arrangements. Part IV then considers the five options: categorical exclusions, mitigated finding of no significant impact, general environmental impact statement, statutory amendment and alternative arrangements. A statutory amendment is analyzing in the context of the military readiness exemption that was created for the Migratory Bird Treaty Act and the judicially created concept of functional equivalence.

I. MILITARY TRAINING REQUIREMENTS

The Department of Defense (DOD) is Congressionally mandated to prepare and train for war. Preparation for war includes developing vessels and weapons and training personnel to sustain combat operations. For the Navy specifically one method of preparation is the use of and training with active sonar for antisubmarine warfare (ASW). Active sonar is a critical tool in the Navy's mission to protect its ships and maintaining freedom of the seas.

[13] Winter v. Natural Res. Def. Council Inc., 555 U.S. 7 (2008).

A. STATUTORY OBLIGATIONS

The DOD is charged with providing "the military forces needed to deter war and to protect the security of our country."[14] The Department of the Navy (hereinafter "Navy"), for example, is statutorily obligated to "be organized, trained and equipped primarily for prompt and sustained combat incident to operations at sea."[15] The Navy's mission is "to maintain, train and equip combat-ready Naval forces capable of winning wars, deterring aggression and maintaining freedom of the seas."[16] This includes the development of "aircraft, weapons, tactics, technique, organization, and equipment of naval combat and service elements" to sustain such operations.[17] In order to comply with its mandate, the Navy must prepare its forces for both an "effective prosecution of war" and "expansion of the peacetime components."[18]

Preparing for an "effective prosecution of war" is not limited to the acquisition of military aircraft, vehicles, or equipment.[19] Preparation incorporates the effective training of personnel. Military equipment cannot be used effectively without sufficiently trained personnel. Accordingly, the Secretary of Defense is required to create a readiness reporting system for the entire Department of Defense that "shall measure in an objective, accurate, and timely manner the capability of the armed forces to carry out" the requirements of the President of the United States.[20] This readiness reporting system requires 24-72 hour updates for changes in readiness

[14] U.S. DEPARTMENT OF DEFENSE, http://www.defense.gov/about/#mission (last visited Apr. 23, 2012).
[15] 10 U.S.C. § 5062(a) (2011).
[16] UNITED STATES NAVY, http://www.navy.mil/navydata/organization/org-top.asp (last visited Apr. 26, 2012).
[17] 10 U.S.C. §5062(d) (2011).
[18] *Id.*
[19] *Id.*
[20] 10 U.S.C. § 117(a) (2011).

status[21] and periodic updates with respect to training and "warfighting deficiencies."[22] Individual combatant commanders are charged with "authoritative direction over all aspects of military operations, joint training, and logistics" in order to ensure compliance with training mandates.[23]

B. ACTIVE SONAR EXAMPLE

The Navy conducts its training exercises "the way it would have to fight in actual combat."[24] There is "no substitute for live fire, realistic combat training."[25] This train-as-you-fight approach ensures personnel are prepared for "prompt and sustained combat incident to operations at sea" as Congressionally required. [26] Antisubmarine training, for example, is a key priority as one of the Navy's most significant threats is from submarines.[27] Modern diesel-electric submarines can operate in near silence, which makes them difficult to track.[28] These submarines can operate in shallow water near the shoreline and block maritime transit routes.[29] Presently, the most effective means to locate these submarines is "active sonar, which emits pulses of sound underwater and then receives the acoustic waves that echo off

[21] 10 U.S.C. § 117(b)(2) (2011).
[22] 10 U.S.C. § 117(c) (2011).
[23] 10 U.S.C. § 164(c)(A) (2011).
[24] Initial Brief for Appellant-Petitioner at 13, Winter v. Natural Res. Def. Council Inc., 555 U.S. 7 (2008) (No. 07-1239).
[25] *Current Environmental Issues Affecting the Readiness of the Department of Defense: J. Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection and the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 108th Cong. 108-119 (2004) (Statement of Mr. Raymond DuBois, Deputy Under Secretary for Installations and Environment, Department of Defense).
[26] 10 U.S.C. § 5062(a) (2011).
[27] Winter, *supra* note 13, at 7.
[28] *Id*.
[29] Declaration of Rear Admiral John M. Bird In Support of Defendants' Memorandum Regarding a Tailored Preliminary Injunction at 11, Natural Res. Def. Council Inc., v. Winter, No. 8:07-cv-00335-FMC (FMOx) (U.S. D. Ct. C.D. CA, W. Div.).

the target."[30] For a carrier strike group,[31] active sonar is a "strike group's *only* effective means to detect and track such submarines before they close within weapons range, and such timely detection therefore 'is essential to U.S. Navy ship survivability.'"[32]

When conducting operational exercises, the use of active sonar is a "critical aspect" of the training.[33] Sonar is a complicated technology and sonar reception can be affected by " the time of day, water density, salinity, currents, weather conditions, and the contours of the sea floor."[34] The specific location of training exercises is important because ocean topography changes. During training, operators "learn how to avoid sound-reducing 'clutter' from ocean floor topography and environmental conditions" as well as how to manage interference and communicate with team members.[35] Sonar operators may also encounter a phenomenon known as surface ducting where "relatively little sound energy penetrates beyond a narrow layer near the surface of the water."[36] When this occurs, submarines typically use this phenomenon to their advantage "by hiding below the duct's thermocline, where the detection capability of even full-power sonar is reduced."[37] In training exercises, therefore, the use of active sonar is necessary at the water's surface.[38]

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[30] *Id.*
[31] A carrier strike group is the group of ships consisting of: an aircraft carrier, a cruiser and destroyer squadron and a carrier airwing that is used for naval operations. *See generally*, COMCARSTRKGRU EIGHT, http://www.ccsg8.navy.mil (last visited Feb. 24, 2012).
[32] Initial Brief, *supra* note 24, at 15.
[33] *Id.* at 14.
[34] Winter, *supra* note 13 at 13.
[35] Initial Brief, *supra* note 24, at 25.
[36] Winter, *supra* note 13, at 30.
[37] Initial Brief, *supra* note 24, at 27.
[38] Winter, *supra* note 13, at 30.

The skills required to effectively employ active sonar during combat operations are considered "highly perishable"[39] so frequent training is necessary "to achieve and maintain combat proficiency and effectiveness."[40] "Unlike an aerial dogfight, over in minutes and even seconds, ASW is a cat and mouse game that requires large teams of personnel working in shifts around the clock to work through an ASW scenario."[41] With variable conditions of the ocean and periodic changes in personnel, the Navy must train with the use of active sonar in order to maintain mandated readiness. Failure to do so would result in Naval personnel being unprepared for sustained operations at sea. "If a strike group does not gain proficiency in MFA sonar, and cannot be certified as combat ready, this carries negative national security implications."[42]

C. ENCROACHMENT

The ocean is not the only location of military training exercises. Military training frequently takes place on land. Of the 650 million acres of public land in the US, only 30 million (or less than 1.2 percent) belongs to the military.[43] Compliance with environmental laws has resulted in DOD training activities "to be cancelled, postponed, or modified" through the use of "workarounds" that "accomplish some training objectives while meeting environmental requirements."[44] At Marine Corps Base Camp Pendleton, for example, less that one mile of the base's 17 miles of

[39] Initial Brief *supra* note 18, at 16.
[40] *Id*.
[41] Declaration *supra* note 29, at 17.
[42] *Id.* at 11.
[43] *Current Environmental Issues, supra* note 25.
[44] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-407, MILITARY TRAINING COMPLIANCE WITH ENVIRONMENTAL LAWS AFFECTS SOME TRAINING ACTIVITIES BUT DOD HAS NOT MADE A SOUND BUSINESS CASE FOR ADDITIONAL ENVIRONMENTAL EXEMPTIONS (2008). (Considering proposed amendments to CAA, RCRA, CERLA by considering ESA, MBTA and MMPA but not analyzing NEPA).

beaches can be used for exercises due to threatened and endangered species.[45] Luke Air Force Base cancelled eight percent of their training exercises due to endangered species and, similarly, at Aberdeen Proving Ground, training exercises were cancelled due to the presence of bald eagles in the area.[46] Naval Base Coronado must limit live fire exercises and Fort Irwin limits training exercises due to the presence of endangered species.[47] The increasing encroachment toward military land has resulted in increased impacts with threatened or endangered species and necessitated the creation of an encroachment database in order to track encroachment effects on unit training.[48] The military's requirements to be adequately trained for combat do not disappear if a conflict with an environmental statute arises.

II. NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

NEPA emphasizes planning. The main planning vehicle, the environmental impact statement, is not intended to be a paperwork exercise. Rather, an EIS, is intended to require agencies to systematically consider the environmental effects of their actions. NEPA does not mandate specific environmental results, it merely includes procedural requirements to ensure that the environment is not overlooked during agency planning. The heart of the analysis is the consideration of alternatives. NEPA does not force agencies to select alternatives that are environmentally beneficial, it requires them to use thought and reason to consider the environmental effects of the alternatives before selecting a final course of action.

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[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] OPNAV INSTRUCTION 11010.40 (2007).

A. PURPOSE

NEPA requires Federal agencies to consider the environmental impact of agency action. The statute's purposes are to "encourage productive and enjoyable harmony between man and his environment"[49] and "promote efforts which will prevent or eliminate damage to the environment and biosphere."[50] NEPA requires an agency to "consider environmental effects of its actions"[51] by requiring the creation of statements whereby an agency "fully disclose[s] its evaluation, thus proving evaluation has been made and warning interested parties of probably environmental effects."[52] NEPA is procedural not substantive. NEPA directs a "reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations."[53] The focus is process and planning with NEPA prohibiting "uninformed – rather than unwise – agency action."[54]

A goal of NEPA is to promote environmental planning "at the earliest possible time to insure that planning and decisions reflect environmental values."[55] By engaging in environmental planning during agency decision-making, federal agencies can "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[56] It is the federal agency responsibility "to use all practicable means, consistent with other essential considerations of

[49] 42 U.S.C. § 4321 (2011).
[50] *Id.*
[51] Louisiana v. Fed. Power Comm'n., 502 F.2d 844, 875 (5th Cir. 1974).
[52] *Id.*
[53] Chelsea Neighborhood Ass'n. v. U.S. Postal Serv., 516 F.2d 378, 384 (2d Cir. 1975) (citing Calvert Cliffs Coordinating Comm., Inc., v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971).
[54] Don't Ruin Our Park v. Stone, 802 F. Supp. 1239, 1246 (M.D. Pa. 1992).
[55] 40 C.F.R. §1501.2 (2012).
[56] 42 U.S.C. § 4331(a) (2011).

national policy"[57] to take actions to plan for the environmental impacts of agency action. The goal is to "[s]tudy, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."[58]

Ultimately, however, the policies and goals of NEPA "are supplementary to those set forth in existing authorizations of Federal agencies."[59]

B. THE ENVIRONMENTAL IMPACT STATEMENT (EIS)

NEPA's primary tool is the environmental impact statement. Federal agencies shall "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement."[60] These statements are to include: "(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity" and "(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."[61]

The role of the EIS "is to serve as an action-forcing device."[62] Through the process of creating the EIS, Federal agencies are engaged in a "full and fair discussion

[57] 42 U.S.C. § 4331(b) (2011).
[58] 40 C.F.R. §1501.2(c) (2012).
[59] 42 U.S.C. § 4335 (2011).
[60] 42 U.S.C. §4332(2)(C) (2011).
[61] 42 U.S.C. §4332(C) (2011).
[62] 40 C.F.R. § 1502.1 (2012).

of significant environmental impacts"[63] in order to "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment."[64]

An EIS is not required for every Federal action. NEPA planning is triggered by "major Federal actions significantly affecting the quality of the human environment."[65] A "major federal action" is an action "with effects that may be major and which are potentially subject to Federal control and responsibility."[66] According to regulations, this includes any of the following agency actions: policy decisions, "such as rules, regulations, and interpretations…formal documents establishing an agency's policies which will result in or substantially alter agency programs;"[67] formal plans, "such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based;"[68] creation of programs, "such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive;"[69] and project approval, "such as construction or management activities located in a defined geographic area."[70]

[63] *Id.*
[64] *Id.*
[65] 42 U.S.C. §4332(2)(C) (2011).
[66] 40 C.F.R. §1508.18 (2012).
[67] 40 C.F.R. §1508.18(b) (2012).
[68] *Id.*
[69] *Id.*
[70] *Id.*

Major is not defined by regulation beyond "significantly affecting the quality of the human environment" therefore it is the responsibility of each agency to develop its own regulations to guide environmental planning in accordance with NEPA.[71]

C. ENVIRONMENTAL ASSESSMENTS AND FONSI

Where it is uncertain whether a proposed action may have significant environmental impacts, "an EA [environmental assessment] may be used to assist the agency in determining whether to prepare an EIS."[72] Like the requirements for an EIS, agency regulations determine whether an EA must be prepared.[73] An EA is not required if an EIS is already being drafted.[74] Typically, EAs are used if the effects of an action are unclear. Where an EA concludes there is likely to be a significant effect on the environment, then an EIS must be prepared. Agencies are free to prepare EAs, however, "on any action at any time in order to assist agency planning and decisionmaking."[75]

If, during the course of the EA, an agency determines there is "no significant impact on the environment, the findings will be reflected in a Finding of No Significant Impact or FONSI."[76] A FONSI is appropriate where a Federal agency determines that a proposed action "will not have a significant effect on the human environment" and concludes no EIS will be prepared.[77]

[71] 40 C.F.R. §1507.3 (2012).
[72] 32 C.F.R. §775.6(b) (2011).
[73] 40 C.F.R. §1501.3(a) (2012).
[74] *Id.*
[75] 40 C.F.R. §1501.3(b) (2012).
[76] 32 C.F.R. §775.6(b) (2011).
[77] *Id.*

Should an agency conclude its action will have no significant impact, NEPA requires an "informed conclusion" to form the basis for a FONSI.[78] An "informed conclusion" is not scientific certainty, it a reasoned analysis that there will be no significant effect.[79] NEPA does not mandate "scientific unanimity regarding the wisdom or environmental effects of a proposed project" in order to substantiate an agency finding.[80] Scientific disagreement or controversy does not abrogate the agency conclusions: "[c]ontroversy is not 'necessarily…equated with opposition.' If it were, public outcry and emotion, 'not the reasoned analysis' in an EA would determine whether the government is required to go through the costly and time-consuming procedure of preparing an EIS for every project."[81] A FONSI and the decision not to draft an EIS can only be judicially overturned "if the decision was arbitrary, capricious, or an abuse of discretion."[82]

D. ALTERNATIVES

When an EIS is required, the "heart" of the analysis is the development and consideration of alternatives.[83] The purpose of examining alternatives is to "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public."[84] Federal agencies are required to "[r]igorously explore and objectively evaluate all reasonable alternatives"[85] including not only those which are considered viable for the EIS, but also those which were eliminated

[78] Don't Ruin Our Park, *supra* note 54, at 1252.
[79] *Id*.
[80] *Id.*
[81] *Id.* (citing North Carolina v. F.A.A., 957 F.2d 1125, 1133 (4th Cir. 1992)).
[82] THE NEPA TASK FORCE REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY, MODERNIZING NEPA IMPLEMENTATION 69 (2003).
[83] 40 C.F.R. §1502.14 (2012).
[84] *Id.*
[85] *Id.*

from further consideration.[86] Any and all alternatives should be considered in order to properly evaluate the merits of each.[87] This includes "alternatives not within the jurisdiction of the lead agency"[88] and the "the alternative of no action."[89] The alternatives considered, however, are limited by the "underlying purpose and need" of the Federal agency action.[90]

It is the responsibility of the individual Federal agency to create and implement the proper procedures to conduct an EIS and require "that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement."[91] The term "range of alternatives" encompasses "all reasonable alternatives, which must be rigorously explored and objectively evaluated, as well as those other alternatives, which are eliminated from detailed study with a brief discussion of the reasons for eliminating them." [92]

The federal agency should identify the "preferred alternative or alternatives"[93] in the EIS and include "appropriate mitigation measures not already included in the

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[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] 40 C.F.R. § 1502.13 (2012).
[91] 40 C.F.R. § 1505.1(e) (2012).
[92] Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act , 46 Fed. Reg. 18026 (Mar. 23, 1981), as amended by 51 Fed. Reg. 15618 (Apr. 25, 1986).
[93] 40 C.F.R. § 1502.14 (2012).

proposed action or alternatives."[94] The analysis shall evaluate both direct and indirect effects[95] and the measures needed to "mitigate environmental impacts."[96]

Included in the analysis of alternatives is the consideration of a no action alternative. The agency must consider the alternative of taking no action.[97] No action can mean two things: 1) "'no change' from the current management direction or level of management intensity" or 2) "the proposed activity would not take place, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity or alternative activity to go forward."[98]

E. PUBLIC PROCESS

NEPA requires agencies to put forth "diligent efforts to involve the public in preparing and implementing their NEPA procedures."[99] The public is involved in planning in several phases of the EIS process. The public is consulted during the project scoping process in order to assess "the significant issues related to a proposed action."[100] The agency is required to place a "notice of intent"[101] in the Federal Register in order to "invite the participation"[102] of other agencies and "other interested persons (including those who might not be in accord with the action on environmental grounds)."[103]

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[94] *Id.*
[95] 40 C.F.R. § 1502.16 (2012).
[96] *Id.*
[97] 40 C.F.R. § 1502.14(d) (2012).
[98] Forty Most Asked Questions, *supra* note 92.
[99] 40 C.F.R. § 1506.6 (2012).
[100] 40 C.F.R. § 1501.7 (2012).
[101] 40 C.F.R. § 1508.22 (2012).
[102] 40 C.F.R. § 1501.7(a)(1) (2012).
[103] *Id.*

Further the agency is obligated to seek comments from the public, "affirmatively soliciting comments from those persons or organizations who may be interested or affected"[104] after the completion of a draft EIS.[105] Comments received by the public must be considered and addressed by the agency in the final EIS.[106]

F. HARD LOOK

Ultimately, NEPA requires a hard look at environmental effects of agency actions: "NEPA's purpose is to ensure that federal agencies take a "hard look" at environmental consequences before committing to action."[107] This "hard look" requires the environmental planning process ensures "a reasoned analysis of the evidence."[108] Because NEPA is focused on procedure, not substance, NEPA does not require "'that agencies achieve particular substantive environmental results…Compliance with NEPA is instead determined on the basis of whether an agency has adhered to NEPA's procedural requirements."[109] NEPA's action-forcing procedures "provide for broad dissemination of relevant environmental information. Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process."[110]

NEPA emphasizes thought and reason, not the generation of unnecessary paperwork. The governing regulations provide "it is not better documents but better

[104] 40 C.F.R. § 1503.1(a)(4) (2012).
[105] 40 C.F.R. § 1502.9 (2012).
[106] 40 C.F.R. §§ 1502.9, 1503.4 (2012).
[107] Ground Zero Center v. US. Dep't of the Navy, 383 F.3d 1082, 1086 (9th Cir. 2004) (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989)).
[108] Cold Mountain v. Garber, 375 F.3d 884, 893 (9th Cir. 2004) (citing Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985).
[109] Ground Zero Center, *supra* note 107, at 1087.
[110] Robertson v. Methow Valley Citizens Council, 409 U.S. 332, 350 (1989).

decisions that count. NEPA's purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action."[111] EIS guidance provides that the EIS "shall be analytic rather than encyclopedic"[112] and the final draft "shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages."[113] The EIS "shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA."[114]

Again, the hard look is process-driven to "ensure that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts."[115]

F. CATEGORICAL EXCLUSIONS AND ALTERNATIVE ARRANGEMENTS

In some occasions no NEPA analysis is required. Agency actions that fall within agency-established categorical exclusions (CATEX) do not require an environmental impact statement[116] and are "excluded from further analysis under NEPA."[117] A categorical exclusion is "a category of actions which do not individually or cumulatively have a significant effect on the human environment" and do not require an EA or EIS.[118] Individual Federal agencies are responsible for implementing their own regulations defining categorical exclusions in the context of the specific agency.[119] Categorical exclusions are prohibited from use, however,

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[111] 40 C.F.R. § 1500.1(c) (2012).
[112] 40 C.F.R. § 1502.2(a) (2012).
[113] 40 C.F.R. 1502.7 (2012).
[114] 40 C.F.R. § 1502.2(c) (2012).
[115] Winter, *supra* note 13, at 23.
[116] 32 C.F.R. §775.2(d) (2011).
[117] 32 C.F.R. §775.6(f) (2011).
[118] 40 C.F.R. §1508.4 (2012).
[119] *Id.*

where the proposed action effects public health or safety, "[i]nvolves effects on the human environment that are highly uncertain, involve unique or unknown risks, or which are scientifically controversial,"[120] or where the exclusion creates "precedents or makes decisions in principle for future actions that have the potential for significant impacts."[121]

The regulations also provide for emergency situations where agency action must be taken in the absence of an EIS. Should "emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions" of NEPA, the Council on Environmental Quality (CEQ) may be consulted for "alternative arrangements."[122] The CEQ, created under title II of NEPA,[123] is charged with developing regulations for the implementation of NEPA and monitoring Federal agencies for compliance.[124] In an emergency, the CEQ must limit the alternative arrangements "to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review."[125] Between 1978 and 2008, the CEQ utilized its authority to create emergency alternative arrangements on forty-one occasions.[126] Courts have upheld all of the CEQ "emergency" decisions.[127]

Since NEPA applies only to actions by Federal agencies, when the President directly takes an action such as issuing an Executive Order, no NEPA planning is

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[120] 32 C.F.R. §775.6(e) (2011).
[121] *Id.*
[122] 40 C.F.R. §1506.11 (2012).
[123] 42 U.S.C. § 4341-4347 (2011).
[124] 42 U.S.C. § 4344(3) (2011).
[125] 40 C.F.R. §1506.11 (2012).
[126] Kate Bowers, *Saying What the Law Isn't: Legislative Delegations of Waiver Authority in Environmental Law*, 34 HARV. ENVTL. L. REV. 257, 273 (2010).
[127] *Id.*

required.[128] Thus, in the military context, if the "President as Commander-in-Chief makes a presidential decision to deploy a weapons system at a particular military installation, the military must follow the President's order and has no ability to disregard it. Accordingly, there is no agency decision regarding the President's military directive suitable for review under NEPA."[129] Further, for actions providing for no agency discretion "such as those carried out under a nondiscretionary mandate from Congress…or as operation of law…, require no analysis or documentation under NEPA or its implementing regulations."[130]

H. CREATING AN EIS

NEPA's environmental planning process is time consuming, expensive and labor intensive. In the simplest scenario, a small EA may consist of 10 to 30 written pages, take two weeks to two months to draft and can cost anywhere between $5000 and $20,000.[131] A lengthier EA "associated with more controversial or high profile projects" can consist of 50-200 pages, take 9 to 18 months to draft and cost $50,000 to $200,000.[132] A full EIS, by contrast is often 200 to 2,000 pages long, takes one to six years to draft and costs between $250,000 and $2 million to create.[133]

The Navy, for example, spent approximately $150 million between 2005 and 2012 on the creation of environmental impact statements.[134] The environmental planning for a three-acre wharf upgrade, for example, is anticipated to take 4 ½ years

[128] Ground Zero Center, *supra* note 107, at 1082.
[129] *Id*. at 1089.
[130] 32 C.F.R. §775.3(b) (2011).
[131] THE NEPA TASK FORCE REPORT, *supra* note 82, at 65.
[132] *Id.*
[133] *Id.* at 66.
[134] Interview, *supra* note 2.

to complete.[135] Accordingly, the lengthy EIS process has been criticized for impairing and delaying military activities and not properly balancing environmental concerns with national security.[136]

III. *Winter v. Natural Resources Defense Council*

This section of the paper considers the role of environmental planning for military readiness activities in the context of the case *Winter v. Natural Resources Defense Council*.[137] In *Winter*, the Navy's use of active sonar was challenged. The United States Supreme Court did not directly address the issue of whether an EIS was statutorily required for the Navy's training exercises,[138] but vacated a preliminary injunction by finding that the Navy's interest in realistic training outweighed the general public interest in marine mammals. The need for realistic training with active sonar was recognized and affirmed by the Court.

Prior to litigation, the Navy issued an EA determining that no significant impact on the environment would occur. *Winter* outlines the additional statutory requirements met and followed by the Navy in reaching that conclusion. Although the thrust of the initial suit was the Navy's failure to create an EIS, *Winter* illustrates the mitigating actions taken by the Navy pursuant to other environmental statutes prior to its conclusion that no EIS was required.

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[135] *Id*.
[136] CC Vassar, *NRDC v. Winter: Is NEPA Impeding National Security Interests?*, 24 J. LAND USE & ENVTL. LAW 279, 303 (2009).
[137] Winter *supra* note 13.
[138] *Id*. at 10. ("This Court does not address the underlying merits of plaintiffs' claims, but the foregoing analysis makes clear that it would also be an abuse of discretion to enter a permanent injunction along the same lines as the preliminary injunction. Plaintiffs' ultimate legal claim that the Navy must prepare an EIS, not that is must cease sonar training. There is accordingly no basis for enjoining such training pending preparation of an EIS – if one is determined to be required – when doing so is credibly alleged to pose a serious threat to national security.")

In *Winter v. Natural Resources Defense Council, Inc*,[139] the Navy trained with mid-frequency active sonar (MFA) in the waters off the coast of southern California.[140] Plaintiffs, Natural Resources Defense Council (NRDC), and other groups concerned with the protection of marine resources asserted that MFA causes injury to marine mammals and sought relief arguing the training exercises violated NEPA.[141] The primary contention by NRDC was that the Navy should have prepared an EIS for the training exercises.[142] Prior to training, the Navy issued an EA that concluded there would be no significant impact on the environment resulting from the exercises.[143] The Navy used computer modeling to assess the potential for damage to marine mammals and concluded no EIS was required because any harm to mammals could be mitigated through voluntary measures the Navy had in place.[144] The Navy determined an EIS was not necessary because compliance with mitigation measures, compliance with the Marine Mammal Protection Act (MMPA) and compliance with the Endangered Species Act (ESA) mitigated any environmental effects that may occur.[145]

After the District Court initially enjoined the Navy from using the MFA sonar, the Navy petitioned the CEQ pursuant to regulations for an alternative arrangement on the basis the injunction created an emergency.[146] The CEQ concluded that the injunction "creates a significant and unreasonable risk that Strike Groups will not be able to train and be certified as fully mission capable" and granted the Navy's

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[139] Winter, *supra* note 13.
[140] *Id.* at 7.
[141] *Id.*
[142] *Id.*
[143] *Id.* at 16.
[144] Initial Brief, *supra* note 24, at 23-24.
[145] *Id.* at 11.
[146] Winter, *supra* note 13, at 18.

request.[147] On appeal to the United States Supreme Court, NRDC claimed the CEQ action "undermines the fundamental purposes of the statute and the statutory scheme Congress enacted"[148] and "contravened NEPA by granting the Navy an exemption from NEPA's otherwise applicable requirements that lacks any foundation in the statutory text."[149]

The United States Supreme Court ultimately vacated the District Court's decision finding "[t]he Navy's need to conduct realistic training with active sonar to respond to the threat posed by enemy submarines plainly outweighs the interests advanced by the plaintiffs."[150] The Court determined "[g]iven that the ultimate legal claim is that the Navy must prepare an EIS, not that it must cease sonar training, there is no basis for enjoining such training in a manner credibly alleged to pose a serious threat to national security. This is particularly true in light of the fact that the training has been going on for 40 years with no documented episode of harm to a marine mammal."[151]

In its initial brief to the United States Supreme Court, the Navy emphasized its concerns for realistic training characterizing the use of MFA as an "essential element"[152] of their antisubmarine training exercises. Although naval vessels routinely train independently, organized exercises are crucial to strike group exercises because the integrated training allows "the group's thousands of Sailors and Marines to function effectively as a single combat force."[153] A key component of these exercises in the use of MFA sonar because MFA sonar is "a strike group's *only*

[147] *Id.* at 18-19.
[148] Initial Brief, *supra* note 24, at 56.
[149] *Id.* at 57.
[150] Winter, *supra* note 13, at 8.
[151] *Id.* at 32-33.
[152] Initial Brief, *supra* note 24 at 10-11.
[153] *Id.* at 13.

effective means to detect and track such submarines before they close within weapons range, and such timely detection therefore 'is essential to U.S. Navy ship survivability.'"[154]

A. MARINE MAMMAL PROTECTION ACT PROTECTIONS

Prior to the litigation in *Winter*, the Navy had been granted a 2-year exemption from MMPA permit requirements[155] for its training exercises.[156] This exemption was not *carte blanche,* however, and was conditioned on a series of mitigation measures. In order to conduct training exercises using MFA sonar, at minimum, five trained lookouts were required on each vessel to be spotting for surface anomalies that could be marine mammals.[157] Operators were required to "report detected marine mammals in the vicinity of the training exercises" and if one was spotted within 1,000 yards of the vessel, reduce sonar levels by 6db.[158] Should a marine mammal approach within 500 yards, the sonar must be dropped by 10db.[159] A marine mammal spotted within 200 yards of a naval vessel required full sonar shutdown.[160] During the entire exercise the MFA sonar was required to be used at the "lowest practicable level."[161] These mitigation measures were taken into consideration during the computer modeling created during the preparation of the EA.[162]

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[154] *Id.* at 15 (emphasis in original).
[155] Marine Mammal Protection Act of 1972, 42 U.S.C. §§ 1361-1423h (2012).
[156] Winter, *supra* note 13, at 15.
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.* at 16.

B. ENDANGERED SPECIES ACT PROTECTIONS

In addition to MMPA compliance, the Navy consulted, as required under the ESA,[163] with the National Marine Fisheries Service (NMFS) in advance of the exercises.[164] The consultation resulted in the development of twenty-nine protective measures designed to protect marine mammals that may be located within the training zone.[165] NMFS issued a biological opinion determining "while MFA-sonar exposure from the SOCAL exercises would likely harass members of threatened or endangered species by temporarily disrupting their behavioral patterns, such exposure is not likely to harm, injure, or kill any listed marine mammal, and, therefore would not likely jeopardize the continued existence of any listed marine-mammal species."[166] NMFS, using its statutory authority under the ESA, issued an incidental take statement allowing the Navy to take listed marine species incidental to the training exercise.[167] NMFS determined that, with mitigation measures in place, "the circumstances that have characterized known strandings" would be minimized.[168]

The mitigation measures, MMPA compliance and ESA biological opinion from NMFS, combined with the computer modeling, provided the basis for the Navy's determination of no finding of significant impact by conducting the training exercise. NEPA is process-driven and does not require "agencies achieve particular substantive environmental results."[169] The emphasis is the process.[170] Ultimately, the Navy engaged in the "hard look" required by NEPA in spite of the fact that no EIS

[163] Endangered Species Act of 1973, 16 U.S.C. §§ 1531 – 1599 (2012).
[164] Initial Brief, *supra* note 24, at 18.
[165] *Id*.
[166] *Id.* at 19.
[167] *Id.*
[168] Initial Brief, *supra* note 24 at 73.
[169] Ground Zero Center, *supra* note 107, at 1087.
[170] Robertson, *supra* note 110, at 350.

was conducted. Operating under two Federal statutes, the Navy determined there would be no significant impact to the environment. That is what NEPA requires agencies to do, to take a well-reasoned look at the environment and plan their actions accordingly.

IV. TOWARDS A MORE EFFICIENT NEPA PROCESS

The Court in *Winter* never addressed the underlying issue of whether the Navy's training exercises required an EIS.[171] Instead, the Court determined there was no basis for a permanent injunction because the plaintiffs' interests in marine mammals "are plainly outweighed by the Navy's need to conduct realistic training exercises."[172] A full EIS would have been costly taking possibly one to six years to draft and costing between $250,000 and $2 million to create.[173] The litigation that resulted from the Navy's decision took almost two years to complete. In February 2007, the Navy issued its EA for the training exercises.[174] The plaintiffs sued shortly after the issuance of the EA and the final Supreme Court decision was decided in November 2008.[175] The decision not to complete an EIS resulted in litigation that, while not as time consuming as drafting an EIS, was likely equally expensive.[176]

The environmental planning process is unworkable if the time and costs of compliance are too high. This section of the paper analyzes five possible means to amend the NEPA planning process to ensure the proper balance between military

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[171] Winter, *supra* note 13, at 32.
[172] *Id*. at 33.
[173] Initial Brief, *supra* note 24, at 66.
[174] Winter, supra note 13, at 15.
[175] *Id.* at 16, 7. *See also* Nat. Resources Def. Council v. Winter, 543 F.3d 1152 (9th Cir. 2008) (Detailing an additional suit made by the same plaintiffs for an different training exercise).
[176] *See generally* Nat. Resources Def. Council v. Winter, 543 F.3d 1152 (9th Cir. 2008) (Confirming the Navy's requirement to pay plaintiffs' attorneys fees as a result of the litigation.).

readiness and environmental stewardship. This section considers: the development of new CATEXs, use of mitigated FONSIs, the creation of a general EIS, a statutory amendment to NEPA and additional use of alternative arrangements. Ultimately, this paper concludes that the most efficient means to balance military training with environmental planning is to amend the CEQ regulations in order to broaden the scope of actions that constitute an emergency. This ensures agency oversight as well as promoting efficiency.

A. CATEGORICAL EXCLUSIONS

One means to develop more efficiency through NEPA is to reconsider the role and uses of categorical exclusions. A categorical exclusion (CATEX) is "a category of actions which do not individually or cumulatively have a significant effect on the human environment" and do not require an EA or EIS.[177] Agency actions that fall within agency-established categorical exclusions do not require an environmental impact statement[178] and are "excluded from further analysis under NEPA."[179] Individual Federal agencies are responsible for implementing their own regulations defining categorical exclusions in the context of the specific agency.[180]

"Categorical exclusions are not exemptions or waivers of NEPA review; they are simply one type of NEPA review."[181] A properly developed CATEX can promote agency efficiency and reduce paperwork and its resulting delay.[182] This insures

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[177] 40 C.F.R. §1508.4 (2012).
[178] 32 C.F.R. §775.2(d) (2011).
[179] 32 C.F.R. §775.6(f) (2011).
[180] *Id.*
[181] Memorandum on Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act, 75 Fed. Reg. 75,628 (2010).
[182] Kevin Moriarty, *Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion*, 79 N.Y.U.L. REV. 2312, 2322 (2004). *See also id.*

agency resources are focused "toward proposed actions that truly have the potential to cause significant environmental effects."[183] A CATEX is "an efficient tool" for NEPA environmental review for projects that "normally do not require more resource-intensive EAs or EISs."[184] A CATEX is not an EA or an EIS, it is a separate agency-developed action that does not require drafting of an EA or an EIS.[185]

In order to establish a CATEX, the agency must ensure that the proposed category of actions "have been found to have no significant effect on the human environment, individually or cumulatively, using procedures adopted by a federal agency in implementation of the regulations as required at § 1507.3."[186] Absence of significant effect is demonstrated through actual, historical data and not "theoretical effects as demonstrated by agency experience."[187] "That is, agencies evaluate past actions that occurred during a particular period and determine how often the NEPA analyzes resulted in FONSIs for the category of actions being considered."[188]

Agencies may identify categories of action as new categorical exclusions "after the agencies have performed NEPA review of a class of proposed actions and found that, when implemented, the actions resulted in no significant environmental impacts."[189] A new CATEX may be appropriate where an agency acquires a new mission or new responsibility or it gains "sufficient experience with new activities to

[183] Memorandum, *supra* note 181.
[184] *Id*.
[185] Moriarty, *supra* note 182, at 2323.
[186] L. RUSSELL FREEMAN ET AL., NEPA COMPLIANCE MANUAL 44 (2d ed. 1994).
[187] *Id.* at 45.
[188] THE NEPA TASK FORCE REPORT, *supra* note 82, at 59.
[189] Memorandum, *supra* note 181.

make a reasoned determination that any resulting environmental impacts are not significant."[190]

If a proposed CATEX is determined to have "potentially significant environmental effects, an agency can abandon the proposed categorical exclusion, or revise it to eliminate the potential for significant impacts. This can be done by: (1) limiting or removing activities included in the categorical exclusion; (2) placing additional constraints on the categorical exclusion's applicability; or (3) revising or identifying additional applicable extraordinary circumstances."[191] Extraordinary circumstances are "those factors or circumstances that help a Federal agency identify situations or environmental settings that may require an otherwise categorically-excludable action to be further analyzed in an EA or an EIS."[192]

Federal agencies must consult with the CEQ prior to developing and publishing NEPA procedures.[193] The requirement to consult includes the agency establishment of new or revised CATEXs.[194] In order to institute new CATEXs an agency must: draft the proposed exclusion, consult with the CEQ, publish for public comment, consider public comments, consult again with the CEQ, publish the final CATEX in the *Federal Register*, and file the final with the CEQ.[195] Because agency decisions to create or revise CATEXs are subject to both public and CEQ oversight, it would be ensured that the revisions are in conformity with NEPA

In order to promote efficiency and exempt military readiness activities, the Navy could create new CATEXs for training exercises. Analyzing past projects, the

[190] *Id.*
[191] *Id*.
[192] *Id.*
[193] 40 C.F.R. § 1507.3 (2012).
[194] Memorandum, *supra* note 181.
[195] *Id.*

Navy could categorize training exercises that result in no significant impact to the environment. Taking those categories, the Navy could then develop set training scenarios that would be subject to categorical exclusions. The Navy's prior project experiences and substantiating data would be subject to public scrutiny and CEQ review prior to finalization.

CEQ approval of a new or amended CATEX provides a certain degree of certainty because, unlike the decision to draft an EA instead of an EIS, the decision to craft a new CATEX requires CEQ oversight. In order to be approved, the CEQ must evaluate the proposed CATEX, publish, and consider public comments. An EA by contrast requires public notice but not the same level as an EIS or CATEX approval. If the CEQ follows this process and approves a CATEX for specific categories of military readiness activities, the Navy could be assured that its use of a CATEX is compliant with NEPA. This eliminates some of the risk of suit for agency action as CATEXs are clearly defined by regulations. Unlike the decision to draft an EA that, as in *Winter*, is based on mitigation measures and a more subjective determination of significant impact on the environment, a CATEX is clearly outlined by regulation.

The use of categorical exclusions for military readiness activities, however, is unlikely to be a successful long-term strategy for promoting efficient environmental planning because their very creation is likely to be challenged on the basis of overreach by the CEQ. First, new CATEXs are appropriate where an agency acquires a new mission. Military training, however, is not a new mission for the DOD. If a new CATEX was approved by the CEQ for military readiness activities, it could be challenged for exceeding the CEQ's statutory and regulatory authority. NEPA does

not include a statutory exemption for national security.[196] Courts have been clear that, absent Congressional action, no exemption exits.[197] Attempts by the CEQ to create one, is likely to be challenged.

Second, CATEXs cannot be created for projects that have effects "that are highly uncertain, involve unique or unknown risks, or which are scientifically controversial" or where the proposed exclusion creates "precedents or makes decisions in principle for future actions that have the potential for significant impacts."[198] In *Winter*, the United States Supreme Court found that the training exercise that was subject to the litigation was "not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment."[199] The Court acknowledged that training exercises have been ongoing "for 40 years with no documented episode of harm to a marine mammal."[200] Naval training exercises have not been linked to a mass marine mammal stranding in over ten years.[201]

Although there is acknowledged scientific certainty in the use of sonar, the plaintiffs in *Winter* were able to establish for the Ninth Circuit that "a 'near certainty' of irreparable harm" existed in the Navy's exercises.[202] The actual level of harm may be questioned but NMFS acknowledge some level of harm to marine mammals by

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[196] Col. E.G. Willard, *Environmental Law and National Security: Can Existing Exemptions in Environmental Laws Preserve DoD Training and Operational Prerogatives Without New Legislation?*, 54 A.F. L. REV. 65, 80 (2004) (citing Weinberger v. Catholic Action of Hawaii, 454 U.S. 139 (1981)).
[197] Concerned about Trident v. Rumsfeld, 555 F.2d 817, 823 (D.C. Cir. 1976) ("This effort to carve out a defense exemption from NEPA flies in the face of the clear language of the statute, Department of Defense and Navy regulations, Council on Environmental Quality Guidelines, and case law.").
[198] 32 C.F.R. §775.6(e) (2011).
[199] Winter, *supra* note 13, at 23.
[200] *Id.* at 32-33.
[201] Interview, *supra* note 2.
[202] Winter, *supra* note 13, at 22.

issuing the incidental take statement. If harm to marine mammals were not a possible outcome of the training exercises, the incidental take statement would not have been needed. There have been at least 15 sonar-related lawsuits against the Navy since 1994.[203] If the mere possibility of harm to marine mammals exists as a result of training exercises, it is likely similar challenges will continue in the future.

The listing of extraordinary circumstances could provide for constraints on CATEXs. For example, a proposed CATEX could provide that presence of species protected by the ESA or MMPA is an extraordinary circumstance that requires additional analysis. Even if a CATEX is applied, the consultation process under ESA and permitting process under MMPA would still be followed ensuring mitigation measures are taken. But, as *Winter* demonstrated, compliance with the ESA and the MMPA does not provide certainty against lawsuits.

The creation of CATEXs would likely be challenged. The use of categorical exclusions for military readiness activities is likely too controversial to be cost effective. Even with the development of CATEXs and listed extraordinary circumstances, that litigation is likely to continue. Accordingly, any benefit gained by efficiency is lost during litigation.

B. MITIGATED FONSI/EA

A second means to develop efficiency in environmental planning for military readiness activities is the use of mitigation and monitoring in a finding of no significant impact (FONSI). Instead of drafting a complete EIS, an EA with mitigation could be utilized for routine training exercises. This option, however, is unlikely to result in a net efficiency benefit because of the continued risk of litigation.

[203] *Id.*

The environmental assessment (EA) is a NEPA tool that can be used to minimize the burden of a complete EIS. "An EA must be performed when an action does not 'normally require[] an environmental impact statement' nor qualify as a categorical exclusion. In other words, an EA is required if an action falls into the gray area between explicit exception and explicit requirements."[204] A FONSI is appropriate where a Federal agency determines that a proposed action "will not have a significant effect on the human environment"[205] and concludes no EIS will be prepared.[206] Unlike an EIS, "alternatives, other than the preferred alternative and no-action alternative, do not require analysis and documentation in an EA."[207]

Mitigation measures contained in an EA may be used to support the finding of no significant impact. This "mitigated FONSI" is "based on the agency's commitment to ensure the mitigation that supports the FONSI is performed."[208] An agency cannot commit to mitigation measures if it does not have the resources to perform the mitigation measures.[209] "Agencies must provide for appropriate public involvement during the development of the EA and FONSI."[210] Public involvement must include "at a minimum, reasonable public notice of the availability of the EA and FONSI."[211] Full public notice and comment is not required.[212]

The CEQ supports the "use of mitigated FONSIs to reduce project impacts

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[204] Moriarty, *supra* note 182, at 2320.
[205] 40 C.F.R. §1508.13 (2012).
[206] *Id.*
[207] THE NEPA TASK FORCE REPORT, *supra* note 82, at 71.
[208] Memorandum on Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76 Fed. Reg. 3843 (2011).
[209] *Id.*
[210] *Id.*
[211] THE NEPA TASK FORCE REPORT, *supra* note 82, at 62.
[212] *Id.*

below the significance threshold."[213] Mitigation measures must be properly documented and clearly identified in order to comply with NEPA.[214] Monitoring is required "in those important cases where the mitigation is necessary to support a FONSI and thus is part of the justification for the agency's determination not to prepare an EIS."[215]

Use of mitigation FONSI in military readiness activities, like the creation of new CATEXs, is likely to not be a net benefit toward efficient environmental planning. EAs fall into a "gray area" and that results in uncertainty.[216] The issue of significant environmental impact is a measure of degree and, even where an EA may be the appropriate tool, there is significant risk that the Navy could be sued for its decision to conduct an EA over a complete EIS. It is in an agency's discretion to take action and follow its own regulations, however, those actions can be challenged through litigation.[217] The existence of a mitigation plan in a mitigated FONSI, for example, indicates that there is some harm to the environment that must be mitigated. If there is environmental harm requiring mitigation, then the question of whether to conduct an EA over an EIS may come down to a matter of degree. Even with mitigation, the degree of harm may be such that it falls into the category of action where a full EIS is required. Like the creation of new CATEXs, any benefit that is gained by not conducting an EIS will be lost during resulting litigation.

1. *Winter v. Natural Resources Defense Council*

Consideration of *Winter v. Natural Resources Defense Council* is helpful here to analyze the usefulness of the use of EAs with mitigation in promoting efficient

[213] *Id.* at 69.
[214] Memorandum, *supra* note 208.
[215] *Id.*
[216] Moriarty, *supra* note 182, at 2320.
[217] *See generally*, Chevron v. Natural Res. Def. Council, 467 U.S. 837 (1984).

environmental planning. As addressed above, one of the underlying issues addressed by the plaintiffs was the decision by the Navy to draft an EA instead of an EIS.[218] Mitigation measures formed the basis for the Navy's decision that the exercises would not result in significant impact on the environment.[219] The Ninth Circuit granted the plaintiffs' motion for a preliminary injunction on the basis that they "demonstrated a probability of success" on their NEPA claim.[220] While the Court found a permanent injunction against sonar use would be an abuse of discretion,[221] the dissent theorized that without an injunction, the Navy would not conduct complete consideration of environmental effects.[222] The dissent further contends: "Had the Navy prepared a legally sufficient EIS before beginning the SOCAL exercises, NEPA would have functioned as its drafters intended: The EIS process and associated public input might have convinced the Navy voluntarily to adopt mitigation measures, but NEPA itself would not have impeded the Navy's exercises."[223]

The dissent raises the issue of whether there would have been a different result if the Navy prepared an EIS instead of an EA. If the Navy had prepared an EIS for these training exercises, there would be two additional factors that would be included: analysis of alternative and public notice and comment. Ultimately, however, all that would be added in terms of environmental planning, however, is time because an EIS would have been more time consuming to prepare.

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[218] Winter, *supra* note 13, at 7.
[219] *Id.* at 16.
[220] *Id.* at 17.
[221] *Id.* at 32.
[222] *Id*. at 35 (Breyer, J. dissenting) ("the absence of an injunction means that the Navy will proceed with its exercises in the absence of the fuller consideration of environmental effects that an EIS is intended to bring.").
[223] *Id.* at 48 (Ginsburg, J. dissenting).

The CEQ supports the use of EAs with mitigation that of mitigated FONSIs to reduce project impacts below the significance threshold.[224] Therefore the use of EAs appears to be an efficient use of resources if environmental impacts can be reduced in the early stages of project planning. This is what the Navy did in *Winter*. The exercises involved environmental planning through the development of the EA. The Navy complied with both the MMPA and the ESA. Although a military-related exemption was utilized, that exemption was limited to 2 years and was conditioned on explicit mitigation measures.[225] The Navy considered differing levels of harassment[226] and utilized computer modeling to predict the level of harassment that would likely occur.[227] The Navy consulted with NMFS and received a no jeopardy opinion – an opinion that concluded the use of MFA sonar "would not likely jeopardize the continued existence of any listed marine-mammal species."[228] Further, the Navy established that "it has used MFA sonar during training exercises in SOCAL for 40 years, without a single documented sonar-related injury to any marine mammal."[229]

Winter demonstrates the uncertainty that can exist in the use of mitigated FONSIs as a planning tool for military readiness activities. Even though the Court did not reach the issue of whether an EIS should have been conducted, the Navy lost almost two years of resources and costs for attorneys' fees as a result of the

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[224] THE NEPA TASK FORCE REPORT, *supra* note 82, at 69.
[225] Winter, *supra* note 13, at 15.
[226] *Id.* at 16. ("Level A harassment, defined as the potential destruction or loss of biological issue (*i.e.*, physical injury), and Level B harassment, defined as temporary injury or disruption of behavioral patters such as migration, feeding, surfacing, and breeding.")
[227] *Id.*
[228] Initial Brief, *supra* note 24, at 19.
[229] Winter, *supra* note 13, at 14

litigation.[230] This uncertainty makes the use of the mitigated FONSI an inefficient planning tool for military readiness activities.

C. GENERAL EIS

A third means to increase efficiency during environmental planning is the creation of a general EIS for training ranges that could be augmented by a supplemental EIS for subsequent training exercises.

The concept of a general EIS is similar to the idea of a hypothetical EIS advanced by the court of appeals for the Ninth Circuit in *Weinberger v. Catholic Action of Hawaii*.[231] In *Weinberger*, the Ninth Circuit required the Navy to "prepare and release a hypothetical EIS for the operation of a facility capable of storing nuclear weapons" where a complete EIS would result in the public disclosure of classified information.[232] A general EIS would be, similar to a blanket nationwide permit,[233] where one expansive EIS could be generated for an entire training range. A general EIS provides the analysis of alternatives required by NEPA. It also includes public notice and comment. A general EIS could then be supplemented by smaller supplemental EISs for specific training activities. The goal of the general EIS is to maximize efficiency by minimizing the number of EIS that must be drafted overall.

The issue with general EIS, similar to the issue addressed above with the creation of new CATEXs, is agency action beyond the statutory and regulatory authority of NEPA. In *Weinberger*, the Supreme Court held the hypothetical EIS

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[230] *See generally* Nat. Resources Def. Council v. Winter, 543 F.3d 1152 (9th Cir. 2008).
[231] Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 141 (1981).
[232] Willard, *supra* note 196, at 83 (citing Weinberger v. Catholic Action of Hawaii, 454 U.S. 139 (1981)).
[233] *See* 33 U.S.C. § 1344(e) (2012).

"was a creature of judicial cloth and not mandated by statute or regulation."[234] Similarly, a general EIS is not contemplated by NEPA or its regulations. A general EIS, even if supplemented by subsequent EISs, would not contain the rigorous analysis of alternatives required by statute. Separate EISs would likely result in improper segmentation of the project that could result in incomplete analysis of the environmental effects of a project. Like the use of CATEXs or mitigated FONSIs addressed above, the use of a general EIS is likely to lose any efficiency benefit during subsequent litigation.

D. STATUTORY AMENDMENT

In order to provide clarity and certainty, a statutory amendment to NEPA is another means to promote efficiency in environmental planning. NEPA does not include a statutory exemption for national security.[235] Courts have been clear that, absent Congressional action, no national security exemption exits.[236] In order to avoid continued litigation NEPA could be amended to provide a direct exemption for military readiness activities. One such exemption was created for the Migratory Bird Treaty Act[237] (MBTA) in 2002. This paper considers the amendment to the MBTA and its applicability to NEPA.

The MBTA prohibits the "taking, killing or possessing" of migratory birds.[238] The Secretary of the Interior is authorized to create and conduct a permitting program

[234] Willard, *supra* note 196, at 83.
[235] *Id.* at 80.
[236] Concerned about Trident, *supra* note 197, at 823 ("This effort to carve out a defense exemption from NEPA flies in the face of the clear language of the statute, Department of Defense and Navy regulations, Council on Environmental Quality ("CEQ") Guidelines, and case law.").
[237] The Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-712 (2011).
[238] 16 U.S.C. § 703 (2011).

to regulate the authorized taking of birds subject to this statute.[239] The MBTA carries both criminal and civil penalties[240] and the unpermitted take prohibition applies, not only to individuals, but also to the Federal government.[241]

In response to concerns over training activities off the coast of Guam, the MBTA was amended on December 2, 2002 to create a take exemption for "military readiness" activities.[242] The take prohibitions do not apply to military readiness activities defined as:

> "(1) (A) all training and operations of the Armed Forces that relate to combat; and (B) the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use. (2) The term does not include – (A) the routine operation of installation operating support functions, such as administrative offices, military exchanges, commissaries, water treatment facilities, storage facilities, schools, housing, motor pools, laundries, morale, welfare and recreation activities, shops and mess halls; (B) the operation of industrial activities; or (C) the construction or demolition of facilities used for a purpose described in subparagraph (A) or (B)." [243]

After an interim period of application, the Secretary of the Interior was obligated "to prescribe regulations to exempt the Armed Forces for the incidental taking of migratory birds during military readiness activities authorized by the Secretary of Defense or the Secretary of the military department concerned."[244]

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[239] 16 U.S.C. § 704(a) (2011).
[240] 16 U.S.C. § 707 (2011).
[241] Humane Society v. Glicksman, 217 F.3d 882, 888 (D.C. Cir. 2000).
[242] 16 U.S.C. § 703 (2011).
[243] *Id.*
[244] *Id.*

The statutory amendment came in response to the use of an island off the coast of Guam as a weapons range.[245] Farallon de Medinilla is the habitat for at least fifteen different species of protected birds and the location for the only live-fire training range in the Pacific Fleet's operating area.[246] This location had been used as a training location for a significant period of time before an EIS was conducted between 1995 and 1999.[247] Due to the presence of protected birds, the Navy applied in 1996 for a permit from the Fish and Wildlife Service (FWS), as required by the MBTA for the unintended takes that would result from its training operations.[248] Although the Navy included mitigation measures in its application, FWS denied the application stating "it could not issue a permit authorizing the Navy's conduct because the conduct was unintentional…unintended conduct, by its nature, would make it impossible for the Navy to ensure compliance with a permit's required limitations and conditions."[249] Although the permits were denied, the FWS allowed the weapons practice to continue.[250]

The Center for Biological Diversity sued to stop the training exercises due to the unpermitted taking of migratory birds.[251] All exercises "that can potentially wound or kill migratory birds" were ordered ceased[252] and the Navy was found to be in violation of the MBTA as the court determined it had "no authority to read into a

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[245] Stephen Dycus, Article, *Osama's Submarine: National Security and Environmental Protection After 9/11*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 1, 14 (2005).
[246] Erin Truban, Comment, *Military Exemptions from Environmental Regulations: Unwarranted Special Treatment or Necessary Relief?*, 15 VILL. ENVTL. L.J. 139, 143 (2004).
[247] *Id.* at 144.
[248] *Id.* at 147.
[249] *Id.* at 148.
[250] Dycus, *supra* note 245, at 14.
[251] Ctr. for Biological Diversity v. Pirie, 201 F. Supp. 2d 113, 115 (D.D.C. 2002).
[252] *Id.* at 123.

criminal statute such as the MBTA an exception for national security or military activities where none exists."[253]

Subsequent to that lawsuit, the MBTA was amended.[254] The amendment provided that "section 2 of the MBTA shall not apply to the incidental takings of migratory birds by members of the armed forces during military readiness activities authorized by the Secretary of Defense or the Secretary of the appropriate military department."[255] The Secretary of Defense is required to "identify measures to minimize any adverse impacts of military training activities on migratory birds"[256] and "monitor the impact of their training activities on migratory bird species."[257] The exemption was intended to last until the Secretary of the Interior filed notice in the Federal Register that the Secretary created a regulation to exempt the Armed Forces.[258] Those regulations issued by the FWS in 2007,[259] require the military departments to "assess the effects of military readiness activities on migratory birds and, in conjunction with the FWS, develop and implement appropriate conservation measures if a proposed action may have a significant adverse effect on a migratory bird population."[260] In doing so, the Department of Defense is exempt from the MBTA take prohibitions for military readiness activities.[261]

Ultimately the amendment "codified and clarified how the act would be applied to military training missions, and it enabled DOD to avoid potential legal

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[253] Dycus, *supra* note 245, at 15 (citing Ctr. For Bio. Diversity v. Pirie, 201 F. Supp. 2d. 113, 115 (D.D.C. 2002)).
[254] *Id*. at 16 (2005)
[255] Truban, *supra* note 246, at 153.
[256] *Id.* at 153.
[257] *Id*.
[258] *Id.* at 156.
[259] Julie Lurman, Article, *Agencies in Limbo: Migratory Birds and Incidental Take by Federal* Agencies, 23 J. LAND USE & ENVTL. LAW 39, 43 (2007).
[260] *Id.*
[261] *Id.*

action that could have significantly affected training and readiness exercises at Farallon de Medinilla and other DOD installations."[262]

NEPA could be amended in a similar manner. Using the same definition as the MBTA, NEPA could be amended to provide for a specific exemption for military readiness activities.

1. *McDowell v. Schlesinger*

In order to properly contrast military readiness activities from non-readiness activities, consider the relocation of resources from one base to another as illustrated by the case *McDowell v. Schlesinger*.[263] This is an entirely different factual scenario from *Winter* and an example of what NEPA, even if amended, must prevent. In *McDowell*, the Air Force decided to move approximately 3000 people from one installation into a town of only 10,000.[264] With only cursory consideration, the decision was made to move bases and realign facilities without any environmental impact statement.[265]

"[N]o environmental impacts were considered in any way in the decision making process that ultimately led to the decision to transfer" and realign the commands.[266] No other agency was involved in the planning. Because of the "'close-hold' nature of the decision making process, no local governmental officials or business or community leaders were contacted regarding the proposed actions."[267]

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[262] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 44.
[263] McDowell v. Schlesinger, 404 F. Supp 221 (W. D. Mo. 1975).
[264] *Id*. at 224.
[265] *Id.* at 226-232.
[266] *Id.* at 232.
[267] *Id.* at 233.

There was "[n]o effort"[268] to consider unemployment concentrations, "[n]o effort"[269] to consider housing-related concerns, and "no attempt"[270] to consider the broader community impacts of moving personnel. No site inspections were conducted and "[n]o potential effects on local land use or growth and development patterns are mentioned."[271]

When challenged, the Air Force's failure to consider the environmental consequences of its action violated NEPA.[272] The court determined that when evaluating potential impact to the environment, "the agency is called upon to review in a general fashion the same factors that would be studied and evaluated in detail in an EIS, and the agency is required to do sufficient investigation to be able to determine the types and potential magnitude of environmental impacts that can be expected from the proposed action. Otherwise an agency might frustrate the purposes of NEPA by a threshold decision based upon insufficient information."[273] The court found that "[s]ubstantive agency decisions on the merits must be set aside by a reviewing court if it is shown that the actual balance of costs and benefits struck by the agency according to NEPA has not been made, or if it is shown that the actual balance of costs and benefits struck by the agency according to NEPA's standards was arbitrary, or gave insufficient weight to environmental factors."[274]

The situation in *McDowell* is what NEPA was designed to prevent. Unlike *Winters*, in *McDowell* there was no consultation, planning or consideration at all. The court in *McDowell* acknowledged that the purpose of NEPA is to rely upon sufficient

[268] *Id.*
[269] *Id.*
[270] *Id.*
[271] *Id.* at 234-235.
[272] *Id.* at 251.
[273] *Id.* at 250.
[274] *Id.* at 253.

information in agency planning.[275] Agency decisions should be set aside where agencies acted arbitrarily or without regard to environmental concerns. Where the Air Force failed to take any factors into consideration, the action was properly held to violate NEPA. Unlike *Winters*, the Air Force did not meet NEPA's procedural requirements through consideration of other statutes, there was no consideration of any kind. Again, contrasting with *Winters*, the Navy was operating under two statutes, composed computer modeling and developed a series of mitigation measures. In these two examples, the Navy engaged in NEPA analysis while the Air Force did not.

2. FUNCTIONAL EQUIVALENCE

Critics of the military's attempts to change environmental statues often accuse the military of engaging in "patriotic pollution."[276] Critics cite concerns that the DOD is capitalizing upon fears about the possibility of another terrorist attack on American soil to advance its legislative agenda that had emerged well before 9/11."[277] They contend that the DOD "should not be exempt from complying with laws intended to apply equally to all Americans, and the public should not be asked to shoulder the additional conservation responsibilities that will result."[278] But, a statutory amendment can be supported by the concept of functional equivalence that is presently applied to the Environmental Protection Agency (EPA).

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[275] *Id*. at 250.
[276] *Current Environmental Issues, supra* note 25 (Statement of Rep. Edward Markey).
[277] *Id*. at 863.
[278] Marcilynn Burke, *Green Peace? Protecting Our National Treasures While Providing for Our National Security*, 32 WM. & MARY ENVTL. L. & POL'Y REV. 803, 821 (2008) (quoting Karen Steur's, senior policy advisor for the National Environmental Trust, testimony on the MMPA).

Taking into consideration the examples of the Navy's compliance with the MMPA and the ESA and the Court's balancing in *Winter*, is it possible that requirements from other environmental statutes rise to the level of NEPA compliance? Must agencies go through the procedural requirements of NEPA if other statutes require the same process? These questions have been asked by the courts and this section of the paper considers two cases where the EPA has been exempted from NEPA based on the functional equivalence of other statutes. While this is a limited exception, this paper considers that, in light of *Winter*, functional equivalence supports a statutory amendment to NEPA for military preparedness exercises.

a. *Portland Cement v. Rukelshaus*

In *Portland Cement v. Ruckelshaus*, the Portland Cement Association challenged the EPA's promulgation of standards of performance for portland cement plants.[279] The Clean Air Act directs the EPA to create "'standards of performance' governing emissions of air pollutants" and EPA acted accordingly.[280] The Portland Cement Association challenged the EPA's action on the basis of non-compliance with NEPA.[281] The essence of the NEPA-based argument was that NEPA requires federal agencies to create an EIS and thus, as a federal agency, the EPA was required to create an EIS prior to the promulgation of the new rules.[282] The Court of Appeals for the District of Columbia Circuit found this approach too "simplistic"[283] and instead framed the issue as "whether the EPA is a 'federal agency' within the meaning of

[279] Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 378 (D.C. Cir. 1973).
[280] *Id.*
[281] *Id.* at 379.
[282] *Id.*
[283] *Id.*

NEPA – whether, and to what extent, Congress intended it to be subject to the NEPA mandate concerning preparation of impact statements."[284]

Acknowledging that the EPA did not exist at the time NEPA was enacted,[285] the court considers the legislative intent of the Clean Air Act and other statutes to determine whether Congress intended NEPA to apply to environmental agencies.[286] Finding the history unclear, the court then turned to the policy behind the legislation.[287] The considered the policy in favor of an exemption for the EPA:

> "The policy thrust toward exemption of the environmental agency is discernible from these factors, taking in combination: (1) An exemption from NEPA is supportable on the basis that this best serves the objective of protecting the environment which is the purpose of NEPA. (2) This comes about because NEPA operates, in protection of the environment, by a broadly applicable measure that only provides a first step. The goal of protecting the environment requires more than NEPA provides, i.e. specific assignment of duties to protection agencies, in certain areas identified by Congress as requiring extra protection. (3) The need in those areas for unusually expeditious decision would be thwarted by a NEPA impact statement requirement. (4) An impact statement requirement presents the danger that opponents of environmental protection would use the issue of compliance with any impact statement requirement as a tactic of litigation and delay."[288]

Considering these policy elements, the court did not decide whether the EPA is in fact exempt from NEPA, but determined that the Clean Air Act provisions the EPA followed, "properly construed, requires the functional equivalent of a NEPA impact statement."[289] Section 111 requires "the Administrator to take into account counter-productive environmental effects of a proposed standard, as well as economic costs to the industry. The Act thus requires that the Administrator accompany a proposed standard with a statement of reasons that sets forth the environmental

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[284] *Id.* at 380.
[285] *Id.*
[286] *Id.* at 380-81.
[287] *Id.* at 383.
[288] *Id.* at 383-84.
[289] *Id.* at 384.

considerations, pro and con which have been taken into account as required by the Act, and fulfillment of this requirement is reviewable directly by this Court."[290]

b. *Environmental Defense Fund v. Ruckelshaus*

Similarly, in *Environmental Defense Fund v. Ruckelshaus*, the EPA's decisions to cancel registrations for DDT were challenged for failure to comply with NEPA.[291] The court found that the EPA's actions had a substantial effect on the human environment.[292] However, the EPA did not create an EIS prior to taking action.[293]

Like *Portland Cement*, the court did not find that an EIS was required: "We conclude that where an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient."[294] The court noted the importance of judicial review and public comment.[295] Because the EPA's action considered the "five core NEPA issues:" environmental impact, adverse effects, alternatives, long and short-term goals, and commitment of resources, a functional compliance with NEPA was found.[296] Because there was functional compliance, "the agency action should be exempted from the strict letter of NEPA requirements."[297]

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[290] *Id.* at 385.
[291] Envtl. Def. Fund v. Ruckelshaus, 489 F.2d 1247, 1249 (D.C. Cir. 1973).
[292] *Id.* at 1255.
[293] *Id.*
[294] *Id.* at 1257.
[295] *Id.* at 1256.
[296] *Id.*
[297] *Id.*

In *Environmental Defense Fund*, the court was clear that the analysis of functional compliance was limited to circumstances "where an agency is engaged primarily in an examination of environmental questions."[298] The court recognized a balanced consideration of NEPA application[299] but limited this exemption narrowly to "those actions which are undertaken pursuant to sufficient safeguards so that the purpose and policies behind NEPA will necessarily be fulfilled."[300] *Portland Cement* was also clear that "NEPA must be accorded full vitality as to non-environmental agencies."[301]

c. FUNCTIONAL EQUIVALENCE AND THE DOD

Why should the analysis of functional compliance be limited only to the EPA and its environmentally focused actions? The court in *Portland Cement* was correct that the EPA did not exist when NEPA was enacted.[302] But, the court did not recognize that NEPA was enacted before every other major federal environmental statute. Considering the history of other environmental statutes in relation to NEPA, functional equivalence can be extended to other agencies. Such extension further supports an amendment to NEPA for military readiness activities.

NEPA is the precursor to more comprehensive environmental legislation and courts have been willing to find exemptions to NEPA that do not exist in the statute. In addition to *Portland Cement* and *Environmental Defense Fund*, courts have found a NEPA exemption to the Federal Insecticide, Fungicide, and Rodenticide Act

[298] *Id.* at 1257.
[299] *Id.* at 1256.
[300] *Id.* at 1257.
[301] Portland Cement Ass'n, *supra* note 279, at 387.
[302] *Id*. at 380.

(FIFRA)[303] and to the Resource Conservation and Recovery Act.[304] NEPA does not include a specific exemption to either FIFRA or RCRA. But, the courts considered functional equivalence based on both FIFRA and RCRA being enacted after NEPA.

Portland Cement provided four criteria to consider in applying functional equivalence: environmental protection, statutes and duties beyond NEPA, the need for expeditious decision and the use of failure to comply as a tactic of litigation and delay.[305] *Environmental Defense Fund* further addressed five core NEPA issues: environmental, impact, adverse effects, alternatives, long and short-term goals, and commitment of resources in order to support functional compliance. Considering these factors in light of *Winter* supports functional compliance for military training activities.

Again, recall the dissent in *Winter* addressed *supra*: "Had the Navy prepared a legally sufficient EIS before beginning the SOCAL exercises, NEPA would have functioned as its drafters intended: The EIS and associated public input might have convinced the Navy voluntarily to adopt mitigation measures, but NEPA itself would not have impeded the Navy's exercises."[306] What the dissent appears to forget, however, is that NEPA is procedural, not substantive. The purpose of NEPA is not to avoid any adverse environmental action; its purpose is to plan. NEPA requires environmental considerations to be a part of agency decision making. NEPA's procedures are "designed to insure fully informed and well-considered decision;

[303] Merrell v. Thomas, 807 F.2d 776, 780 (9th Cir. 1986) ("We infer that Congress believes that analyses in support of registration currently are an adequate substitute for an EIS in the FIFRA context. Congress does not intend to make NEPA apply.")
[304] State of Alabama v. Envtl. Protection Agency, 911 F.2d 499, 504 (11th Cir. 1990).
[305] Portland Cement, *supra* note 279, at 383-84.
[306] Winter, *supra* note 13, at 48 (dissent by J. Ginsburg and J. Souter).

NEPA does not bar actions that affect the environment, even adversely."[307] There is no requirement that agency action have no adverse impact on the environment. NEPA requires merely that the agency thoroughly consider the environmental impact prior to taking action.

In *Winter*, the Navy did not fail to consider the environmental consequences of its actions. To the contrary, the Navy was working within the statutory framework of two Federal environmental statutes. When NMFS issues a biological opinion it is engaged in its specific statutory area of expertise. The Navy should be allowed to rely on NMFS technical experience.

The dissent in *Winter* further theorizes: "[t]he *absence* of an injunction means that the Navy will proceed with its exercises in the absence of the fuller consideration of environmental effects that an EIS is intended to bring. The absence of an injunction thereby threatens to cause the very environmental harm that a full preaction EIS might have led the Navy to avoid (say, by adopting the two additional mitigation measures that the NRDC proposes)."[308] But, in the case of NEPA planning, redundancy should be avoided in favor of efficiency. As stated above, the EIS is intended to be "analytic rather than encyclopedic."[309] An EIS "shall be no longer than absolutely necessary."[310] What additional planning, other than added cost and time, would an EIS have provided? The Navy's EA concluded no impact was likely to occur as a result of its training exercises.

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[307] Southern Utah Wilderness Alliance, 177 IBLA 29 (IBLA 2009).
[308] Winter, *supra* note 13, at 35 (Ginsburg, J. dissenting) (emphasis in original).
[309] 40 C.F.R. § 1502.2(a) (2012).
[310] *Id.*

In *Winter*, one key NEPA regulatory requirement was absent, the consideration of alternatives. Alternatives are the "heart"[311] of NEPA analysis and this includes not only a rigorous exploration of all reasonable alternatives, but also the consideration of "the alternative of no action."[312] Although the case does not address this specifically, it is plausible to assume one alternative in conducting the MFA sonar training exercises would have been to do so without any mitigation measures whatsoever. Doing so, presumably, would have allowed the Navy to freely operate the sonar in any manner required to train its personnel. But, through the process of consultation with NMFS and compliance with the MMPA, the Navy restraints were put into place that created an alternative to the most optimum training scenario.

What does not appear to have been considered was the alternative of taking no action. In the case of planning a training exercise, the no action alternative is likely to be the alternative of not conducting the training evolution at all or conducting the training without the use of MFA sonar. If, however, MFA sonar operations are "mission-critical"[313] as the United States Supreme Court concluded, is the no-action alternative a "reasonable alternative"[314] as NEPA requires? The Supreme Court recognized that sonar training is a "highly perishable skill"[315] that the President considered "essential to national security."[316] When balancing the interests of the marine mammals, the Court determined that "[t]hose interests, however, are plainly outweighed by the Navy's need to conduct realistic training exercises to ensure that it

[311] 40 C.F.R. § 1502.14 (2012).
[312] 40 C.F.R. § 1502.14(a)-(c) (2012).
[313] Winter, *supra* note 13, at 25.
[314] 40 C.F.R. § 1502.14(a) (2012)
[315] Winter, *supra* note 13, at 25.
[316] *Id.* at 26.

is able to neutralize the threat posed by enemy submarines."[317] Given this balancing conclusion, is it realistic for the Navy to analyze an alternative where the MFA sonar is never turned on?

In light of the facts in *Winter*, it is important to reconsider factors outlined in *Portland Cement* and *Environmental Defense Fund*. The policy considerations behind the concept of functional equivalence support NEPA exemption where the environment is being protected. Acknowledging that environmental protection is more than NEPA recognizes that other statutes may have the effect of NEPA compliance. *Portland Cement* recognized this is especially true where "expeditious decision would be thwarted by a NEPA impact statement."[318] Military readiness activities, based on the statutory mandate for training, are such expeditious activities. *Winter* recognized the importance and time sensitivity of military training, specifically with active sonar.

The concept of functional equivalence has been extended to agencies other than the EPA. The Ninth Circuit held that NEPA does not apply to the Secretary of the Interior's designation of critical habitat pursuant to the ESA.[319] The court found that "Congress intended that the ESA procedures for designating a critical habitat replace the NEPA requirements."[320] Further the Sixth Circuit determined that the Fish and Wildlife Service (FWS) was not required to file an EIS when listing an endangered species.[321] The court determined a statutory conflict between the ESA and NEPA that "relieves the Secretary of the burden to prepare an impact statement

[317] *Id.* at 33.
[318] Portland Cement, *supra* note 279, at 383-84.
[319] Douglas County v. Babbitt, 48 F.3d 1495, 1502 (9th Cir. 1995).
[320] *Id*. at 1503.
[321] Pacific Legal Found. v. Andrus, 657 F.2d 829 (6th Cir. 1981).

before listing any species as endangered or threatened."[322] The court reasoned by analogy to a case that exempted the Department of Health, Education, and Welfare from the requirement of filing an impact statement before terminating a hospital's federally assisted status where "the Secretary had a statutory duty to terminate the hospital's status."[323]

d. The Sikes Act

Similarly, the Sikes Act, predating the ESA, "has long been the primary authority under which the DoD manages the natural resources on its installations."[324] No longer discretionary, the Sikes Act requires that every DOD installation prepare an Integrated Natural Resources Management Plan [INRMP] in order to manage natural resources.[325] INRMPs must address: "fish and wildlife management; land management; forest management; fish and wildlife oriented recreation; enhancement of fish and wildlife habitat; and restoration and enhancement of wetlands."[326] By statute the installation INRMP is to be reviewed every five years but DOD policies mandate an annual review.[327] Currently, the creation or revision of an INRMP is not subject to NEPA.[328]

If NEPA were amended to provide for a clear statutory exemption for military readiness activities, efficiency in environmental planning would be promoted. Considering the applicability of the judicially recognized concept of functional

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[322] *Id*. at 841.
[323] *Id.* at 838 (citing Milo Community Hospital v. Weinberger, 525 F.2d 144 (1st Cir. 1975).
[324] Major Lori May and Major Jonathan Porier*, Master Environmental Edition II: It's Not Easy Being Green: Are DOD INRMPS a Defensible Substitute for Critical Habitat Designation*, 58 A.F. L. REV. 175, 183 (2006).
[325] *Id.*
[326] *Id.* at 184.
[327] *Id*. at 195.
[328] *Id*. at 194.

equivalence and applying that concept to the DOD is not capitalizing on fears of terrorism as some critics suggest. It is recognizing that courts have acknowledged that redundancy does not necessarily equate with increased environmental protection.

E. ALTERNATIVE ARRANGEMENTS

A fifth means to address environmental planning for military readiness activities is use of alternative arrangements. CEQ regulations provide for alternative arrangements where "emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions" of NEPA. [329] Alternative arrangements are not "a statutorily delegated power." [330] Alternative arrangements were created by the CEQ by regulation to provide for exemptions. [331] NEPA does not explicitly provide for an emergency exemption.[332] Although, NEPA "does not make completion of an EIS mandatory under all circumstances."[333] The statute "acknowledges that other goals and interests of the United States may make strict compliance with NEPA impossible."[334] "Congress also recognized that 'essential consideration of national policy' could prevent the meticulous application of NEPA."[335]

Use of this exemption does not permit a federal agency to circumvent NEPA completely. [336] CEQ approval of alternative arrangements constitutes NEPA compliance "since the waiver provision specifies that CEQ will make 'alternative

[329] 40 C.F.R. §1506.11 (2012).
[330] Bowers, *supra* note 126, at 274.
[331] *Id*.
[332] *Id*.
[333] Valley Citizens, *supra* note 12, at 3-6. Bowers, *supra* note 126, at 10-11.
[334] Bowers, *supra* note 126, at 12.
[335] *Id.*
[336] Willard, *supra* note 196, at 82.

arrangements' for compliance."[337] Federal agencies are able, however, to "make a decision without going through the public notice and comment portion of the law."[338] The "CEQ has unique expertise in dealing with NEPA requirements, and therefore may craft modifications with greater precision than Congress."[339]The CEQ has approved alternative measures 41 times since 1978 and courts "have upheld every one of the small handful of emergency exemptions that have been challenged."[340]

"Emergency[341]" is not defined giving the CEQ discretion to determine "what circumstances merit an exemption."[342] In *Crosby v. Young,*[343] for example, the CEQ authorized alternative arrangements for the Department of Housing and Urban Development to approve funding prior to the completion of an EIS.[344] A loan-related deadline was determined by the CEQ "to be imminent."[345] The Court determined the "CEQ had the authority to interpret the provisions of NEPA to accommodate emergency circumstances."[346]

It is sufficient for the CEQ to declare a situation an emergency. In a suit resulting from an agency decision to change preservation measures for the California

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[337] Bowers, *supra* note 126, at 268.
[338] Willard, *supra* note 196, at 82.
[339] Aaron Ehrlich, *In Hidden Places: Congressional Legislation That Limits the Scope of the National Environmental Policy Act*, 13 HASTINGS W.-N.W. J. ENV. L. & POL'Y 285, 301 (2007).
[340] Bowers, *supra* note 126, at 273; CEQ ALTERNATIVE ARRANGEMENTS, http://ceq.hss.doe.gov/nepa/eis/Alternative_Arrangements_Chart_092908.pdf (last visited Apr. 23, 2012).
[341] 40 C.F.R. §1506.11 (2012) ("Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.")
[342] Bowers, *supra* note 126, at 268.
[343] Crosby v. Young, 512 F.Supp. 1363 (E.D. Mich. 1981).
[344] *Id.* at 1386.
[345] Vassar, *supra* note 136, at 295.
[346] *Id.* at 80 (citing Crosby v. Young, 512 F.Supp. 1363, 1386 (E.D. Mich. 1981)).

condor, the court held that the CEQ decision to approve alternative arrangements is "entitled to substantial deference."[347] Where the CEQ determines an emergency exists, "immediate documentation of the environmental effects of this decision" by the CEQ is not required.[348] In a military-related case, the decision that a "continuing and unstable predicament in the Middle East creates an emergency within the meaning of NEPA and section 1506.11" was determined by CEQ.[349] The finding of an emergency and approval of alternate arrangements by the CEQ was held to be not arbitrary and capricious.[350]

In *Winter* one of the issues certified on *certiorari* to the Supreme Court was "whether CEQ permissibly construed its own regulation in finding 'emergency circumstances.'"[351] The Court ultimately determined: "Based on the necessity of constant training for combat preparedness and the risk that ill-trained Strike Groups pose to thousands of soldiers and sailors, CEQ concluded that an emergency existed. CEQ approved alternative arrangements in accordance with the emergency circumstances regulation which would allow the Navy to continue training with MFA sonar."[352]

Even though the term emergency is not defined, emergency scenarios are limited. "The policy behind NEPA and CEQ's intent in establishing the regulation does not support the finding of an emergency unless a situation arises unexpectedly

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[347] *Id*. at 409.
[348] Nat'l Audubon Soc'y v. Hester, 801 F.2d 405, 406 (D.C. Cir. 1986).
[349] *Id.* at 13.
[350] *Id.* at 16.
[351] Petition for Writ of Certiorari, Winter v. Natural Res. Def. Council, 2007 U.S. Briefs 1239 (U.S. Mar. 31, 2008), (No. 07-1239).
[352] Vassar, *supra* note 136, at 291 (citing Decision Memorandum Accepting Alternative Arrangements for the Southern California Composite Training Unit Exercises (COMPTUEXs) and Joint Task Force Exercises (JTFEXs) Scheduled to Occur Between Today and January 2009, 73 Fed. Reg. 4189, 4189-91 (Jan. 24, 2008)).

and requires immediate attention to either forestall or mitigate imminent, grave harm."[353]

Because the scope of emergencies is narrow, alternative arrangements are not the ideal solution for military readiness activities. The Navy could decide, for example, to petition directly to the CEQ for each training exercise for alternative arrangements. But as the Navy acknowledges: "Although existing exemptions are a valuable hedge against unexpected future emergencies, they cannot provide the legal basis for the Nation's everyday military readiness activities."[354] The DOD position is that "it is unacceptable as a matter of public policy for indispensible readiness activities to require repeated invocation of emergency authority."[355] Petitioning the CEQ for every training exercise could be construed as an attempt to circumvent NEPA by creating a national security exemption that does not exist. If the basis for an emergency exemption is not based in statutory authority, a military readiness exception would likely be viewed as an overreach of CEQ's authority and subject to judicial challenge.

F. COMBINED SOLUTION

The author prefers the solution of a statutory amendment to NEPA. Extension of functional equivalence to the DOD eliminates redundancies in environmental planning and promotes efficiency and flexibility. If NEPA was amended to provide an exemption for military readiness activities, a certain level of oversight would be lost. As functional equivalence demonstrates, however, oversight is not necessary to provide incentive for mitigation measures. Mitigation measures and environmental

[353] *Id.* at 299.
[354] *Current Environmental Issues, supra* note 25 (Statement of Mr. Raymond DuBois, Deputy Under Secretary for Installations and Environment, Department of Defense).
[355] *Id.*

protection are often derived from other statutes (i.e. the MMPA, the ESA or the Sikes Act). But, the political reality is that any support for an amendment is likely to be shadowed by demands for oversight to prevent the spread of "patriotic pollution."[356] The military would likely be continually criticized for failing to take environmental precautions and having some limited oversight protects against those criticisms.

Considering *Winter* and the five possible solutions to promote efficiency in military environmental planning, the recommended means to balance efficiency, environmental protection and flexibility for military exercises is a combined approach of a statutory amendment and alternative arrangements. A blanket military readiness exemption to the NEPA statute risks lack of support oversight for military activities. While it would promote efficiency by completely eliminating the requirement to apply NEPA to military readiness activities, the lack of oversight could be construed as the DOD's attempt to avoid and erode years of environmentally protective statutes. The ideal approach to balance the military's needs with environmental stewardship is to use an amendment, not to create a complete exemption but to create an expanded definition of categories of actions for which an alternative arrangement can be petitioned.

The MBTA cited above followed a similar process in creating a military readiness exemption. While the statute itself was amended, that exemption was intended to last only until the Secretary of the Interior filed notice of intent to amend FWS regulation.[357] The regulations did not result in a continued complete exemption for military readiness activities, the regulations directed military departments to "assess the effects of military readiness activities on migratory birds and, in

[356] *Current Environmental Issues*, *supra* note 25 (Statement of Rep. Edward Markey).
[357] Truban, *supra* note 246, at 156.

conjunction with the FWS, develop and implement appropriate conservation measures if a proposed action may have a significant adverse effect on a migratory bird population."[358] Only after doing so would the DOD be exempt from the MBTA take prohibitions for military readiness activities.[359]

Here, NEPA should be amended to direct the CEQ to revise its regulations relating to emergency situations. The amendment, like the MBTA, should direct the CEQ to expand its definition of emergency and encompass military readiness activities. Like the MBTA, the CEQ should be directed to promulgate regulations to provide for a separate, limited process for military readiness activities that involve appropriate mitigation measures, as needed. Because the definition of emergency is so narrow, the regulations must be expanded in order for alternative arrangements to be utilized more effectively. As discussed above, if the CEQ undertook to change its regulations to include a military readiness exemption without direction from Congress, it could be challenged. Such action by the CEQ would likely be construed as an attempt to exceed its statutory mandate and craft an exemption that is not authorized by statute.

Use of alternative arrangements preserves a level of oversight by the CEQ. This may preclude, or at least minimize, criticism associated with a statutory amendment. Working directly with the CEQ to craft alternatives preserves the expertise of CEQ to "craft modifications with greater precision than Congress."[360]

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[358] *Id.*
[359] *Id.*
[360] Ehrlich, *supra* note 340, at 301.

CONCLUSION

The military is often criticized for attempting to exempt itself from environmental statutes.[361] Often the challenge to NEPA-related disputes is "if Congress intended a national security exemption to NEPA, it would have included it in the statute as it did with other environmental statutes."[362] But, NEPA was enacted before those "other" environmental statutes and NEPA's expensive, manpower intensive environmental planning has made it inefficient and unworkable for military readiness activities. NEPA's purpose is not to generate paperwork – even excellent paperwork – but to consider the environment in federal actions.

In order to promote effective and efficient environmental planning, NEPA should be amended to direct the CEQ to amend its regulations pertaining to emergencies to include military readiness activities. Using the CEQ to develop alternative arrangements ensures a balance between efficient use of resources and environmental stewardship.

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[361] *See generally*, *Environmental Laws: Encroachment on Military Training?: Hearing Before the S. Comm. on Environment and Public Works*, 108th Cong. 108-308 (2003) (debating military exemptions from environmental laws of training); *Current Environmental Issues Affecting the Readiness of the Department of Defense: J. Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection and the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 108th Cong. 108-119 (2004) (debating a military exemption from RCRA, the CAA and CERCLA); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-407, MILITARY TRAINING: COMPLIANCE WITH ENVIRONMENTAL LAWS AFFECTS SOME TRAINING ACTIVITIES, BUT DOD HAS NOT MADE A SOUND BUSINESS CASE FOR ADDITIONAL ENVIRONMENTAL EXEMPTIONS (2008) (concluding exemptions from the CAA, RCRA and CERCLA for military training is unnecessary).

[362] Donovan, *supra* note 3, at 26-27.